In the

Supreme Court of the United States

October Term, 1976

No. 76-1

W. W. TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, W. W. TAYLOR, respectfully prays that a WRIT OF CERTIORARI issue to review the decision of the United States Court of Appeals for the Tenth Circuit, affirming the decision of the trial court, entered in this proceeding on May 12, 1976.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, affirming the decision of the trial court, and said Court's denial of Petitioner's Petition for Rehearing are attached in the Appendix hereto.

JURISDICTION

The Petitioner was convicted of one count of conspiracy [18 U.S.C. § 371] and two counts of the Travel Act [18 U.S.C. § 1952] on March 14, 1975. The Petitioner's appeal was affirmed by the United States Court of Appeals for the Tenth Circuit on May 12, 1976. On June 8, 1976, Petitioner's Petition for Rehearing was denied by the United States Court of Appeals for the Tenth Circuit. On June 17, 1976, the United States Court of Appeals for the Tenth Circuit granted Petitioner's Motion for Stay of Mandate Pending Application for Certiorari. This Court's jurisdiction is envoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Tenth Circuit erred by restricting the principle espoused in *United States v. Stagman*, 446 F. 2d 489 (6th Cir. 1971), thereby holding that the trial court adequately instructed the jury on Petitioner's theory of the case?
2. Whether the Court of Appeals for the Tenth Circuit erred in holding that the trial court did not err in striking as surplusage portions of the indictment?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner, Taylor, was charged along with Co-defendants David Hall and R. Kevin Mooney in the United States District Court for the Western District of Oklahoma in a six count indictment in Cause No. CR 75-8 on January 16, 1975. (R. 1-9)

Petitioner Taylor was charged in Count II with conspiracy, along with Co-defendants Hall and Mooney, to commit an offense against the United States, namely interstate travel or transportation or the use of interstate facilities in aid of racketeering enterprises in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1952 by traveling and using interstate facilities to bribe an Oklahoma public official and to accept a bribe in violation of 21 O.S. § 381 — bribing officer, and 21 O.S. § 382 — officers receiving bribes. Petitioner Taylor was also charged in Counts V and VI, along with Co-defendant Mooney, for interstate travel or transportation in aid of racketeering enterprises in violation of 18 U.S.C. § 1952 by using interstate facilities to bribe Oklahoma public officials (Hall and Rogers) and to accept a bribe in violation of 21 O.S. § 381 — bribing officers, and 21 O.S. § 382 — officers receiving bribes.

Co-defendant Mooney pled guilty to Count II at the arraignment (Tr. Vol. VI). The government dismissed Counts V and VI as to Mooney. Mooney subsequently testified in behalf of the government at the trial of this cause.

The cause was tried to a jury, Petitioners Hall and Taylor being tried together, from February 24, 1975, through March 14, 1975. Prior to trial, however, counsel for Petitioner Taylor filed a Motion to Dismiss and Memorandum

in Support Thereof (R. 164), which was denied by the trial court (R. 262). The order denying said motion, as well as the remarks of the trial court immediately prior to the opening statements (Tr. 167-168), reflect that portions of the indictment [Count II, paragraph 8 (R. 4), Count V, paragraph 14 (R. 8) and Count VI, paragraph 5 (R. 9)], alluding to the acceptance of a bribe, were struck by the trial court as merely surplusage.

During the course of the trial, there was uncontroverted evidence that co-defendant Hall, then governor of Oklahoma and an ex-prosecutor in Tulsa, warned Mooney by telephone, upon being apprised of cash demands by Rogers, that there was an Oklahoma statute which specifically prevented the payment of funds to any official and specifically the payment of funds to such an official as John Rogers. Hall cautioned Mooney and asked Mooney to caution Taylor that under no circumstances should they ever pay Rogers any money for services that he could provide (Tr. 269-270). When Mooney transmitted this information to Taylor, Taylor was visibly shaken by the revelation and Taylor and Mooney conferred, taking the position that they did not want to proceed if such a payment to Rogers would be illegal. However, alternatives, such as consulting work for Rogers, were discussed as possibilities if not in conflict with the Oklahoma statute related by Hall (Tr. 272-273). Mooney and Taylor contacted Hall the next night through a pay telephone (Hall having previously related to Mooney that he had information that he, Hall, was being "framed") in order that Taylor could, and did, hear Hall directly. Hall reiterated the warning as to the payment of money to Rogers (Tr. 272-274). According to Mooney, Taylor was willing to make payment prior to the time he knew it was illegal (Tr. 274-275). As testified by Mooney, he and Taylor were so "stupid" that they didn't know the alternatives to payment were in conflict with the statute (Tr. 272).

Co-Defendant Hall was found guilty on Counts I, II, III and IV and Petitioner Taylor was found guilty on Counts II, V and VI. (R. 607, 608). Both Defendants filed

their Motions for Judgment of Acquittal notwithstanding the verdict or in the alternative for a new trial on March 21, 1975, the same being overruled on April 14, 1975. (R. 439, 450). On April 25, 1975, both Taylor and Hall were sentenced. Hall being sentenced to three years on each of Counts I, II, III, and IV, to run concurrently and Petitioner Taylor was sentenced to 18 months on each of Counts II, V and VI, also to run concurrently. (R. 607, 608). Notice of Appeal was filed by Appellant Taylor on April 25, 1975. (R. 613). On May 25, 1976, the United States Court of Appeals for the Tenth Circuit affirmed the Petitioner's conviction.

REASONS FOR GRANTING THE WRIT

1. The application of the *Stagman*, *supra*, principle, is an issue to which this Court has not previously addressed itself. A delineation of the propriety of such an instruction in light of the proposition that an accused is entitled to a specific instruction on his theory of the case if there is evidence to support it [*Sparrow v. United States*, 402 F. 2d 826 (10th Cir. 1968] is essential under the supervisory power of this Court to ensure all defendants their right to due process of law.

The manner in which the Court of Appeals disposed of the reliance placed upon the *Stagman*, *supra*, principle is distressingly illogical. That Court held that the lack of a direct warning of offers to pay, as opposed to actual payments, rendered reliance on Stagman unwarranted. The trial Court's instructions were therefore adequate.

Viewing the evidence in the light most favorable to support a defensive charge [*Richardson v. United States*, 403 F. 2d 574, 575 (D.C. Cir. 1968)], the Court plainly erred. The primary flaw in the Court of Appeal's reasoning was their failure to recognize that Petitioner relied upon Hall's statement and the logical extension thereof. Hall specifically warned Mooney [who related the warning to Taylor

(Tr. 272-273)] and the Petitioner [Tr. 273-274] that under no circumstances should he (Petitioner) pay Rogers any money, that such payment would be in violation of an Oklahoma statute. Hall, however, being aware that Petitioner was going to continue to "push" the plan within the limits of the law, failed to apprise Petitioner of the illegality of alternatives to payment and promises of payment. In sum, Petitioner relied not only upon Hall's statement and the logical inference [given the particular circumstances] therefrom, he also relied to his detriment upon a *material omission* by Hall. Thus, Hall's statement not only buttressed Petitioner's subsequent actions, but also constituted the foundation thereof. If Hall had been Petitioner's attorney, a charge on good faith reliance on counsel would have been required [Devitt & Blackmar, Federal Jury Practice & Instructions § 16.15 (1975)], as it is obvious, especially in light of Mooney's testimony [Tr. 274-275], that Hall's advice was a significant factor in Petitioner's actions.

The Court of Appeals, without the support of a cogent reason, upheld the denial of a charge on this defensive theory. The Court of Appeals has interjected an apparently arbitrary condition into a jury's inquiry into a defendant's specific intent. If such practice is allowed to continue, then society will suffer as a result of the imposition of strict liability for offenses for which the legislature has prescribed mens rea. This abrogation of legislative intent, an inevitable consequence of the abandonment of the proposition that an accused is entitled to an unfettered charge on his defensive theory [*Beck v. United States*, 305 F. 2d 595 (10th Cir. 1962); *United States v. Von Roeder*, 435 F. 2d 1004 (10th Cir. 1971)], demands the attention of this court. Otherwise, the constitutional guarantee of due process of law will slowly but surely become a meaningless concept for the accused.

2. The principles of *Ex Parte Bain* [121 U.S. 1 (1886)] have been ignored to the deteriment of the role of the grand jury. In order to eliminate further errosion of the role of the grand jury as a shield to protect the public, in addition to providing a deterrent against over zealous prosecutors, this Court should grant certiorari.

We are confronted with the deletion of a portion of the indictment that went not merely to form, but rather substance. The political backdrop is apparent from the record (Tr. 457-786; 1192-1218; 1263-1270; 1302-1682). The function of the grand jury has been, *inter alia*, to protect the people against the abuse of government power [see *United States v. Briggs*, 514 F. 2d. 794 (5th Cir. 1975)]. Yet here, we see such an abuse. When the government presented the case to the grand jury it surely knew that there was no evidence of an actual bribe involved. Every attempt by the government agent, Rogers, to obtain money from Petitioner failed. Why then did the government "push" bribery counts through the grand jury? The question is not whether we are dealing with mere pleading, but whether the grand jury would have indicted at all in the absence of the prosecutor's influence as to actual bribes. Where a nebulous concept such as conspiracy is involved, a tangible crime such as "a bribe" lends credence to the prosecutors requests for a "blanket indictment" including the bribe and less understandable crimes. Again, the question is whether the grand jury would have indicted had it been fully apprised of Petitioners continuous resistance to pay cash to Rogers? The representation by the government of evidence of the acceptance of a bribe could not but result in an indictment. Thus, a prosecutor, when confronted with the prospect of a reluctant grand jury, can present evidence and "push" an indictment through the grand jury. Later those counts which the prosecutor desires to have stricken can be eliminated. This subsequent elimination is favorably accepted by a judge who views it as a time saving device.

The real question is whether the erosion of the historical rule of the grand jury is going to continue. This Court should not sanction an abrogation of the 5th Amendment, but rather provide a deterrent to prosecutorial misconduct by either: (1) forcing the prosecutor to reindict whenever he wishes to strike a count or paragraph that

might have had a material effect on the grand jury's decision; or (2) requiring the trial court to dismiss the indictment whenever intentional misrepresentations are presented to the grand jury by the prosecutor. [The analogy is to the effect of intentional misrepresentations in an affidavit. See *United States v. Thomas*, 489 F. 2d 664, 667-672 (5th Cir. 1973)]. The result would not require the consumption of scarce judicial resources and would strengthen the grand jury as a shield while providing an element to deter over zealous prosecutors. This is especially needed in light of the proposition that prosecutors may be immune from suits contesting the use of perjured testimony [see *Brawer v. Horowitz*, 19 CrL 2189 (5/12/76)], and there is at present no effective check on prosecutorial power [See Carey, The Role of a Prosecutor in a Free Society, 12 CrL. Bull. 317 (1976 — May)]. Any inconvenience to the prosecutor would be a self-regulating mechanism whereby the rights of an accused would be protected, defensive expenditures would not be needlessly incurred, the cumulative effect of several possible violations, some of which did not occur, would not induce the grand jury to return a "blanket indictment", the public confidence in the administration of justice would be increased, and the dictates of *Ex Parte Bain, supra, Stirone v. United States*, 361 U.S. 212 (1960), and *Russell v. United States*, 396 U.S. 749 (1962) would be observed.

SUMMARY AND PRAYER

For the above stated reasons, a WRIT OF CERTIORARI should issue to review the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the ..... day of July, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Honorable James M. Peters, Assistant United States Attorney, 4434 Federal Building, Oklahoma City, Oklahoma 73102. I further certify that all parties required to be served have been served.

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PUBLISH

Appendix "A"

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 75-1358 and 75-1359

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID HALL and W. W. TAYLOR, Defendants-Appellants.	Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. Cr. 75-8)

Mac Oyler of Oyler & Smith, Oklahoma City, Oklahoma, for Defendant-Appellant, David Hall.

Emmett Colvin of Colvin & Jackson, Dallas, Texas, for Defendant-Appellant, W. W. Taylor.

O. B. Johnston III, Assistant United States Attorney (David L. Russell, United States Attorney, Drew Neville, Assistant United States Attorney, William S. Price, Assistant United States Attorney, and William R. Burkett, United States Attorney, on the brief), for Plaintiff-Appellee.

Before BREITENSTEIN, McWILLIAMS and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is a criminal case in which the appellants above named, Hall and Taylor, were convicted of violating the Hobbs Act, 18 U.S.C. Section 1951[1], and the Travel Act, 18 U.S.C. Section 1952.[2]

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1. Section 1951 provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> * * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

2. Section 1952 provides in part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--
>
> > (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

The indictment charged offenses against David Hall, W. W. Taylor and R. Kevin Mooney. Mooney, however, entered a plea of guilty and testified against the others. The facts giving rise to the indictments were as follows:

Hall was at the time in question Governor of Oklahoma. W. W. Taylor was president, treasurer and secretary of a corporation called Guaranteed Investors Corporation. Taylor developed a plan to sell ten million dollars in promissory notes of Guaranteed Investors, a newly formed corporation, which notes were to be secured by government guaranteed collateral. Taylor sought to sell these notes to the Oklahoma Employees Retirement System (System). Hall, Taylor and Mooney, the latter being a lawyer for Guaranteed Investors, made an agreement for the plan to be presented to the Chairman of the Systems'Board of Trustees. Hall did not control the board of the employees retirement system, but he had numerous contacts on the board because he had made appointments of several members of the board. Mooney had brought Hall and Taylor together. Hall agreed to use his influence to sell the plan to the board. He demanded, however, $100,000 to be divided between him and Mooney. Hall contacted John Rogers, Oklahoma Secretary of State and Chairman of the Board of Trustees of the System, and told him that $50,000 would be paid to them, meaning Hall and Rogers, if the Taylor plan was accepted by the board of the employees retirement system. The $50,000 was to be divided equally between Rogers and Hall. Hall then advised Mooney that he (Mooney) was going to pay one-half of the $25,000 which was to be paid to Rogers. True to his word, Hall persuaded the members of the board to approve of the Taylor plan and it did so on December 23, 1974, subject only to a letter of legality from the Attorney General plus a letter of approval from the investment counselor of the board.

The indictment contained six counts. Count 1 alleged that Hall attempted to extort $50,000 from Taylor and Mooney and Guaranteed Investors Corporation in violation of the Hobbs Act, Section 1951, supra.

Count 2 arose under Section 1952, supra. It charged that the three defendants conspired to travel in interstate commerce and to use facilities in commerce with the intent to promote, manage, and carry on unlawful activity and a scheme to bribe a public officer or officers for the purpose of influencing the board of employees retirement system to invest ten million dollars in Guaranteed Investors Corporation in violation of Section 381, Title 21, O.S.A., and to accept a bribe in violation of Section 382, Title 21, O.S.A.,in violation of Section 1952, Title 18 U.S.C.

The count further alleged that the conspiracy also involved the payment of $50,000 for which Hall would use his official position to influence Rogers, the Chairman of the Board of Trustees of the System, to call meetings and to gain approval of the sale of the ten million dollars in securities of Guaranteed Investment Corporation.

In Counts 3 and 4, Hall was charged with attempting to bribe John Rogers and with accepting a bribe himself in violation of 21 O.S.A. Sections 381, 382, together with Section 1952 of the Federal Criminal Code.

Counts 5 and 6 charged Taylor and Mooney with attempting to bribe Hall and Rogers in violation of 21 O.S.A. Section 381, together with Section 1952, supra.

Previously Taylor had sought to sell his plan through Mooney to the Board of Trustees of the Retirement System, but

to no avail. Only after a meeting with Hall in Fort Worth, Texas, at which time Hall told Mooney that he thought his effort should be worth $100,000 which he characterized as a finders fee and which he offered to share equally with Mooney, did things begin to happen.[3] This took place on December 2, 1974, and the next day Mooney told Hall that Taylor approved of the payment. The very same day Hall had his talk with Rogers, at which time he offered to split the $50,000 with him in exchange for his help in getting the Taylor plan accepted. It was some days later that Hall told Mooney that he expected him to contribute a part of his $25,000 to Rogers.

However, Rogers proceeded to the office of the Oklahoma Attorney General and reported the $25,000 offer. He did so on the same day that the offer was made to him. The Attorney General was out and so Rogers related the offer to an assistant attorney general. On December 4, Rogers met with Mr. Derryberry, the Attorney General, and a few days later the two of them met with the FBI. At that time Rogers agreed to monitor conversations by means of a microphone attached to his person and to his telephone. There is evidence that in the days following the described conversations, Hall contacted Rogers and other members of the board of trustees trying to persuade them to approve the plan. Furthermore, in December, Taylor and Mooney met with Rogers, Hall and members of the board on several occasions. At a number of the meetings with Hall and Rogers, the subject of the payment came up. Finally, on December 23, the board approved the plan subject to the obtaining of a letter of legality from the Attorney General and a letter of commitment from the board.

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3. Hall wanted his $50,000 share to be paid in four annual $12,500 installments, beginning after he left office.

On December 31, Hall told Mooney that any payment to Rogers was illegal under Oklahoma law and that Mooney should caution Taylor against making any such payments to Rogers. Nevertheless, Taylor and Mooney talked about paying Rogers in the form of a consulting fee and in subsequent conversations they talked to him (Rogers) generally about payments in an effort to gain the release of a commitment letter. Subsequently, Taylor showed the check to Mooney, which was payable to him but which was destined for Rogers.[4] He did not turn it over to him. But, finally, on January 13, Taylor advised Mooney that Rogers had agreed to the release without any payment being made. The next day Mooney went to Oklahoma City from Texas. When Rogers handed over the letter, Mooney was arrested. Hall and Taylor were subsequently arrested.

Mooney pled guilty to Count 2 of the indictment, whereupon the government dropped the charges against him which were set forth in Counts 5 and 6. The charges against Hall and Taylor were tried to a jury starting February 24, 1975, and continuing to March 14, 1975. As we have mentioned earlier, Hall was convicted on Counts 1,2,3 and 4, whereas Taylor was convicted on Counts 2,5 and 6. Both sought judgments of acquittal of judgments notwithstanding the verdict or a new trial. These motions were denied.

The several points raised by the appellants include the following:

1. That the indictment was insufficient.

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4. All of this activity was designed by Taylor and Mooney as a manipulative effort directed to persuading Rogers to issue the approval letter.

2. That the court erred in its manner of dealing with a juror who became ill after the cause was submitted to the jury for determination.

3. That prejudice requiring reversal resulted from the pretrial publicity.

4. The refusal to give an instruction requested by Hall and Taylor.

5. The inadequate voir dire of prospective jurors.

6. The receipt in evidence of certain of the tape recordings.

7. Misconduct of the district attorney.

I.

WHETHER THE INDICTMENT WAS DEFICIENT

The main objection of both defendants to the indictment arises from the withdrawal of a portion of it as surplusage. In addition, Hall argues that the indictment fails to adequately allege extortion and further contends the indictment was inconsistent in charging him, Hall, with extortion, and Taylor with bribery, offenses which were mutually exclusive and, therefore, failed to give adequate notice of the charge.

A. Whether the elimination of a charge against Hall was error.

We consider first whether the court erred in striking a portion of the indictment. The language which was withdrawn is contained in Counts 2,3 and 4. In Count 2, the conspiracy count,

in the process of alleging the object of the conspiracy, it was said "and to accept such bribe in violation of Section 382, Title 21 O.S.A." In Counts 3 and 4 the court struck out or withdrew "and to accept a bribe himself in violation of Section 382, Title 21 O.S.A." In striking the language the judge explained:

> I consider this [a] matter of surplusage and I, out of an abundance of caution, fearful that this could be some measure of inconsistency, not as to Taylor necessarily, but as to Hall, so out of an abundance of caution, and since the courts involved with this, treated as surplusage, will set forth alleged violations of the Statute, I have decided to precede [sic] this way in the case. (R. VIII, p. 168)

Thus, the trial considered the portion stricken as surplusage subject to deletion without destroying the indictment's validity or depriving the court of its jurisdiction. In denying the motions of Hall and Taylor to dismiss, the court again stated that the withdrawn language was surplusage. Now both defendants renew their attack on the trial court's ruling, arguing that the court improperly amended the indictment and thus invaded their right to be indicted by the grand jury, a right guaranteed by the Fifth Amendment.

It is fundamental that an indictment being the product of the grand jury is not subject to amendment. This has long been recognized. Ex Parte Bain, 121 U.S. 1 (1886). In the cited case the indictment had charged the defendant with making a false report regarding the condition of a bank with intent to deceive the comptroller of the currency and the agent appointed to examine the affairs of said associations as well as the United States and other persons unknown. The trial court struck the language of "the comptroller of the currency" as surplusage. Following this, the defendant was convicted. The Supreme Court ordered the issuance of the writ of habeas corpus and did so on the ground that the court was

without power to make the change and that the result of it was to change the charging part of the indictment. The opinion indicates that any deviation from the rule is fatal.

More recently, in Stirone v. United States, 361 U.S. 212 (1960), the Supreme Court reaffirmed its holding in Bain saying that the latter case had never been disapproved and reaffirmed its holding that a defendant is not to be tried on charges not part of the indictment in its original form. The Stirone case was brought under the Hobbs Act and it charged the defendant with utilizing his influence as a union official to interfere with the shipment of raw materials destined for a factory. The trial court there charged the jury that they could convict even though there was interference with finished products rather than raw materials. The Supreme Court regarded this as being not an insignificant variance between allegation and proof. It held that the trial court was powerless to enlarge upon charges contained in the grand jury indictment. It did not, however, rule that a court was unable to withdraw charges and thus narrow the defendant's liability.

Through the years the Bain case has become less absolute in its effect. See United States v. Dawson, 516 F.2d 796 (9th Cir.), cert. denied, _____U.S._____, 96 S.Ct. 104 (1975), recognizing that the court may change an indictment as to matters of form or surplusage. Federal Rules of Criminal Procedure 7(d); 8 J. Moore, Federal Practice, par. 7.05(1); 1 Wright & Miller, Federal Practice and Procedure: Criminal Section 127. Also, it is now agreed that courts are able to withdraw from jury consideration counts that are not supported by the evidence. Salinger v. United States, 272 U.S. 542 (1926); United States v. Dawson, supra; Bary v. United States, 292 F.2d 53 (10th Cir. 1961); United States v. Griffin, 463 F.2d 177 (10th Cir.), cert. denied, 409 U.S. 988 (1972); United States v. Musgrave, 483 F.2d 327 (5th Cir.), cert. denied, 414 U.S. 1023

(1973); New England Enterprises, Inc. v. United States, 400 F.2d 58 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969).

Apart from insufficiency of evidence, the power to withdraw charges from the jury is no longer disputed. Thomas v. United States, 398 F.2d 531 (5th Cir. 1967); Overstreet v. United States, 321 F.2d 459 (5th Cir. 1963), cert. denied, 376 U.S. 919 (1964). Indeed, the focal point appears to be whether the change involves an expansion or a narrowing of the charges. See 8 J. Moore, Federal Practice, par. 7.05(3). See also Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1176-68 (1960). This conclusion is supported by Salinger v. United States, supra, wherein the court withdrew a part of the indictment in a mail fraud case on the theory that it was not supported by the evidence.

Based upon this analysis, we conclude that there is no ground for complaint in the case at bar. Hall was charged originally with extortion, conspiracy to bribe a public official, bribery and acceptance of a bribe. The net result of the withdrawal reduced the charges to extortion, conspiracy and bribery. In so doing it reduced the charges against Hall. The ruling of the trial judge is supported by Salinger, by United States v. Griffin, supra; by United States v. Thomas, supra; and by United States v. Overstreet, supra.

Thus, we see no prejudice to Hall as a result of the action taken by the court. Possible prejudice to Taylor as a result of striking the charges against Hall is even more remote.

B. Whether the allegation of extortion was sufficient.

Hall maintains that Count 1 charging him with extortion under the Hobbs Act was insufficiently set forth in the indictment. He says that the indictment fails to allege that he induced anyone to make payments by coercion or under color of official right. He argued this to the trial judge, who rejected it. He makes the same argument here. In our judgment, then, the trial court ruled correctly. The important elements in a Hobbs Act case, according to Stirone v. United States, supra, are interference with interstate commerce and extortion. The Act was originally used in cases involving extortion by labor union officials. In more recent times it was used in cases of corruption on the part of public officials. See United States v. Braasch, 505 F.2d 139, 150-152 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975), in which policemen were convicted under the Hobbs Act for carrying out the extortion of money from owners of bars and taverns. The Court of Appeals for the Seventh Circuit upheld convictions in this fact setting, recognizing that the use of public office to obtain payments comes within the part of the Act which provides "under color of official right" since it is the wrongful use of official power which is the congressional intent in using the wording "under color of official right." See also United States v. Crowley, 504 F.2d 992, 994-996 (7th Cir. 1974), which involved policemen collecting protection payments, and see United States v. Stasczuk, 502 F.2d 875, 877-878 (7th Cir. 1974), cert. denied, 96 S.Ct. 65 (1975). An alderman obtained payments for not opposing amendments to the zoning ordinance. There was an en banc hearing in this case, but it had nothing to do with the "under color of official right" part of the case. The influence of the alderman as being within the "under color of official right" standard was not changed.

Of a similar nature is United States v. Mazzei, 521 F.2d 639 (3d Cir.), cert. denied, 96 S.Ct. 446 (1975). See also United States v. Irali, 503 F.2d 1295 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975).

These cases show that it is unnecessary that the accused have absolute power to determine the issue. It is sufficient that it is within his jurisdiction (the scope of his office) and that the victim has a reasonable belief that he does have the power. In turn, it is the exploitation of this belief that fulfills the requirement. Cf. United States v. Braasch, supra, at 151.

At bar we have the governor of a state dealing with a board with which he not only purports to have influence but indeed has influence. He exploited the belief in the victim in order to obtain payments. In doing so he induced payment "under color of official right." Further, the indictment in question is adequate in setting forth the elements of the offense and in giving notice. Hall could not have been in doubt as to the nature and character of the charge from an ordinary reading of the indictment, and from a reading of the Act he should have been convinced that force, violence or fear were not essential, but that"under color of official right" was an alternative way of violating. See 18 U.S.C. Section 1951(b)(2); United States v. Crowley, 504 F.2d 992, 994-996 (7th Cir. 1974); United States v. Kenny, 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914 (1972); United States v. Mazzei, 521 F.2d 639 (3d Cir.), cert. denied, 96 S.Ct. 446 (1975).

For a case closely similar to the one before us see United States v. Trotta, 525 F.2d 1096 (2d Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3439 (U.S. February 3, 1976)(Docket No. 75-1032).

In sum, we conclude that the misuse of Hall's office was sufficiently alleged. The indictment said that he attempted to use his office to influence the board's decision and that he had appointed certain members of the board. This, together with the elements of the statute which are set forth, results in the indictment's being sufficient.

C. The alleged inconsistency.

Was there logical inconsistency in charging Hall with extortion in Count 1 and in charging Taylor with bribery and conspiracy to bribe in Counts 2,5 and 6? We conclude that there was not.

The question of charging Hall with the acceptance of a bribe need not be considered. We disagree with the argument advanced that bribery and extortion are mutually exclusive. To be sure, they are distinct crimes as shown by United States v. Addonizio, 451 F.2d 49, 72-73 (3d Cir.), cert. denied, 405 U.S. 1048 (1972); United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); United States v. Kahn, 472 F.2d 272, 278 (2d Cir.), cert. denied, 411 U.S. 982 (1973). It cannot be said that in a bribery case there is never an aspect of coercion on the part of the bribee. The Seventh Circuit has said that such conduct (extortion) may also constitute classic bribery. The Braasch court also noted that bribery and extortion are not to be considered mutually exclusive nor does the fact that the alleged victims of the extortion were also bribers nullify anything. See United States v. Hyde, supra.

So, therefore, charging Hall with extortion and Taylor with bribery was not logically inconsistent. Nor do we see any inconsistency giving rise to the invalidity arising from Hall

extorting from Taylor to bribe Rogers because, first, there is no logical inconsistency and, secondly, modern courts refuse to apply these mechanical rules which in years past made for easy but often very unjust decisions.

II.

THE ILLNESS OF ONE OF THE JURORS

After completion of the court's charge to the jury and after the court had checked with the jury to determine whether all of the members were in good health, the alternate jurors were discharged and the jury was sequestered. After a full day of deliberation, one of the jurors was not feeling well and permission was sought to stop deliberating at 4:30 p.m. Permission was granted. The following morning at around 5:00 a.m. the juror who had been ill, a Mrs. Dell Meyer, a 65-year-old lady, complained to the bailiff of chest pains. At her request the bailiff called Dr. S.S. Sanbar, her personal physician. On the doctor's advice she was taken to the emergency room of St. Anthony's Hospital and upon arrival at 5:25 a.m. she was placed under the care of a Dr. Kenneth M. Richter, a resident. The usual tests for a suspected heart attack were performed and although some irregularities in enzyme levels were found, the doctor's diagnosis was that she had tietzes, which in plain language is an arthritis-like inflammation of the ribs and sternum. The doctor administered a shot of Demerol, 50 mg, around 6:00 a.m., and after consulting with Dr. Sanbar, admitted her to the hospital for observation.

A meeting of counsel with the judge was held in the judge's chambers at 11:30 a.m. Judge Daugherty suggested that there be a stipulation between counsel to complete the case with less than 12 jurors in accordance with Rule 23(b), Fed.R.Crim.Proc. Counsel

for the defendants refused and then moved for a mistrial. The judge then stated that he had talked to Dr. Sanbar at 10:30 a.m. and had been advised that the doctor had examined Mrs. Meyer, had said that she would be able to resume her duties at 1:30 p.m. that day, and that he would release her from the hospital for that purpose. Based on that report, the court denied the motion for mistrial and ordered that jury deliberations be resumed at 1:30 p.m.

The trial court did accede to a defense request that the testimony of the doctors be taken in open court. Both doctors testified. Dr. Richter said that in view of the elevated enzyme levels, he thought it wise to admit Mrs. Meyer for observation and stated that he administered the Demerol at 6:00 a.m., and said further that its effects would wear off in three to four hours. He also testified that he did not believe that he administered any medication or that he had observed any physical condition that would impair Mrs. Meyer's mental faculties as of the time of the starting of deliberations.

Dr. Sanbar also testified. He said that he had been Mrs. Meyer's doctor since March 1973, having treated her for high blood pressure and related chest pains. On prior occasions he had prescribed various kinds of medication for her, including Dramamine, Ornex, Bentyl and Valium. He said that Mrs. Meyer had on March 13 at 6:00 p.m. contacted him about her sleep and nervousness problems. He had prescribed a sleeping pill. On March 14 he prescribed Motrin for arthritis pain. He described her enzyme levels as borderline normal or "very slightly elevated." He examined her at around 10:00 a.m. This was in the presence of a bailiff. He concurred with Richter's diagnosis that it was an arthritis condition rather than a heart attack. Sanbar said that he had told the judge that he thought she should stay

overnight in the hospital, but that at the judge's request said that he would ask her if she felt well enough to resume her duties and she said that she did. He thereupon discharged her from the hospital. Also, he said that Mrs. Meyer took 5 mg of Valium at 12 noon that day. He said he could not give an opinion as to whether this affected her mental processes.

On the basis of the testimony of the doctors, the judge once again denied the motion for a mistrial, saying that there was no support for a finding that Mrs. Meyer could not satisfactorily continue her juror duties as of 1:30 p.m.

Complaint is made that the administration of medication affected Mrs. Meyer's mental processes; that she was medically unfit; and that there was a violation of the sequestration state growing out of the bailiff's failure to report administration of the medication and the trial judge's communication with her through her doctor.

A. The juror's fitness.

The problem here presented is unlike that which arises when a defendant offers a post-trial affidavit of a juror in an effort to impeach the verdict. In our situation medical testimony is offered in an effort to establish that the juror was unfit for jury duty, whereby the defendants were allegedly denied a jury trial by 12 competent persons.[5] The statutory standard

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5. Cf. 18 U.S.C. Section 1865(b)(4), not relied on by the defendants, which declares unqualified for jury service any person who "is incapacitated by reason of mental or physical infirmity, to render satisfactory jury service."

set forth in the note is incapacity by reason of mental or physical infirmity and thus the issue is whether the trial court erred in not finding the existence of incapacity.

The defendants argue that from the total evidence there arises an inference that the juror lacked fitness physically and psychologically to serve. We disagree. The undisputed evidence given by Doctors Richter and Sanbar is that Mrs. Meyer had not suffered a heart attack. Although her physician recommended overnight hospitalization, he did not insist upon it and was governed by her own estimation of her physical condition. Given the fact that she was able to leave on March 14, there was an inference that the doctor was willing to discharge her for the purpose of jury duty. The difference between his account and that which the judge reported is insignificant. There is nothing in the record to even suggest that the doctor considered her incapable of continuing her service or that such continuation might constitute a danger to her health. Accordingly, we are of the opinion that as far as her physical condition was concerned, the evaluation from the evidence and the determination that she was able to continue is not erroneous. The defendants seek to make use of a stipulation tendered by the district attorney which recited that the juror's physical capacity was a binding admission. This stipulation was not accepted by the defendants and in our view had no evidentiary value either as a stipulation or admission.

Nor do we consider the psychological competency of the juror to be subject to question. As to the contention of the defendant that she was subject to anxiety, there would have to be much more convincing evidence than we have to justify a finding that there existed psychological impairment, for it would have to establish clearly that she was incompetent to understand the issues and to deliberate at the time the services were rendered. See United

States v. Dioguardi, 492 F.2d 70, 78 (2d Cir. 1974). This goes on the principle that an accused is entitled to a rational juror, but he cannot insist upon a perfect specimen. Citizenry differ in their general mental capacity, stability, anxieties, and ability to deal with stress. The juror could not be regarded as incompetent unless at the time of service she was incompetent to understand the issues and to conduct deliberation. Nothing in the evidence suggested that the juror here was so incapacitated that she did not perform as well as many people do ordinary occupational tasks. Peterman v. Indian Motorcycle Co., 216 F.2d 289, 293 (1st Cir. 1954). As to the drugs, we need only look to the testimony of the doctors that Valium is frequently prescribed for people doing ordinary business. There is no evidence that the mixing of Valium and the Demerol would have a cumulative affect.

The fact that Mrs. Meyer returned voluntarily to jury duty is evidence that she had some will and individual determination. In light of all of this, we do not think that there is the kind of clear evidence that would be required. Perhaps the best decision is that of the Second Circuit in United States v. Dioguardi, supra. There, subsequent to the case, the conduct of one of the jurors indicated a possible psychosis. Judge Lumbard, the writer of the opinion, noted that the evidence was insufficient to compel an inquiry.

Of a similar nature was Peterman v. Indian Motorcycle Co., supra. In this case also the parties sought to show that one of the jurors had symptoms indicating that a psychosis existed. The trial court rejected the contention, saying that the offer of proof was inadequate. This judgment was affirmed.

Also relevant is United States ex rel Daverse v. Hohn, 198 F.2d 934 (3rd Cir. 1952). Here again there was a refusal to hear the claim in a habeas corpus proceeding. In Jorgenson v. York Ice Machinery Co., 160 F.2d 432 (2d Cir. 1947), Judge Learned Hand rejected efforts to allow impeachment of the jury's verdict where the foreman suffered mental distress when his son died during the jury deliberation.

We have considered the decision of this court in Baker v. Hudspeth, 129 F.2d 779 (10th Cir. 1942), which is relied on by the defendants. That case does not support defendants' position. We conclude that the contention is lacking in merit.

B. The alleged violation of sequestration.

We must reject the contentions that the activities of the U.S. Marshals-bailiffs and of the trial judge were invalid per se. On the contrary, from what appears in the record the marshals and the judge were cautious in the extreme. None of the acts complained of show any influences.

C. Whether the trial court coerced the juror

Complaint is made that the querying of the juror through Dr. Sanbar constituted coercion or unauthorized communication with a single juror. The trial judge was faced with a difficult situation which made it necessary that he communicate with the doctor and through the doctor with the juror in order to ascertain her condition. The judge was the person best qualified to carry out the inquiry. We see no impropriety in the judge's communicating with the juror through the doctor. What was said does not add up to pressure. Jenkins v. United States, 380 U.S. 445 (1965) is relied on, but it is not germane, for in that case

coercion with respect to arrival of the verdict was exercised toward the entire group. Nor does Goff v. United States, 446 F.2d 623 (10th Cir. 1971) support the defendants. Similarly, Burrough v. United States, 365 F.2d 431 (10th Cir. 1966) is entirely distinguishable. In short, the trial court was careful and conscientious in dealing with a most difficult problem. We perceive no error.

III.

PREJUDICIAL PUBLICITY?

Hall argues that the trial court did not take appropriate measures to counteract the allegedly prejudicial publicity which appeared prior to his trial. While he urges that the court's denial of his motions for continuance or transfer and for sequestration of the jury during the trial was error, his argument comes down to the adequacy of the voir dire of the prospective jurors by the trial judge. Hall contends that the court erred in refusing to allow counsel to ask the questions, in not asking all of the questions proposed by appellant, and in not questioning the jurors individually with regard to the publicity. He further contends that the voir dire as conducted by the court was inadequate.

Either the court or counsel may ask questions on voir dire, Fed.R.Crim.P. 24(a),[6] and it is the practice in this Circuit for

6. "(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. ****

the court to ask the questions. United States v. Addington, 471 F.2d 560 (10th Cir. 1973); Brundage v. United States, 365 F.2d 616 (10th Cir. 1965). The conduct of the voir dire is within the discretion of the court, Ristaino v. Ross, _____U.S._____, 96 S.Ct. 1017 (1976); Ham v. South Carolina, 409 U.S. 524 (1973); United States v. Crawford, 444 F.2d 1404 (10th Cir. 1971); the court's exercise of that discretion will not be disturbed unless there is a clear showing of abuse. United States v. Hill, 526 F.2d 1019 (10th Cir. 1975); United States v. De Pugh, 452 F.2d 915 (10th Cir. 1971), cert. denied, 407 U.S. 920 (1972). It is the trial judge's duty to insure that the jurors empanelled are competent to serve, and, particularly, that they are impartial. Where there is a possibility that prospective jurors have been exposed to prejudicial publicity, the court must examine with care so as to insure that they are not biased. Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), appeal after remand, 430 F.2d 675 (1970), cert. denied, 400 U.S. 1022 (1971); 8 J. Moore, Federal Practice, par. 24.03.

Judge Daugherty asked approximately 10 or 20 questions of the jury array. Included were the general questions which are propounded in most cases. He also asked whether they knew any of the parties, their attorneys, or principal witnesses; whether anyone was employed by the state of Oklahoma and if so, whether that would affect their impartiality; similarly, whether anyone was employed by the federal government; whether anyone or any members of the immediate family was in law enforcement or had attended law school. He also inquired whether anyone had read or heard any news accounts of the case; whether anyone had discussed it with persons outside the family; if there had been any discussion within the immediate family and was the juror the object of persuasion by family members; if anyone had formed an opinion; if anyone knew of any reason why she or he could not be

fair and impartial; if they could put aside anything they had read, been told, or heard about the case. While all but one of the original 12 jurors had been exposed to news accounts of the case, no one had discussed it with persons outside of the family, and no one had been the object of persuasion. Two stated that they had formed an opinion, and, after a conference at the bench, during which the judge denied a defense request that the two be questioned individually to determine the nature of their opinions, they were dismissed. The court asked the same questions of all replacement jurors.[7]

Prior to the trial, Hall had submitted 27 general questions to be asked on voir dire as well as 19 questions, primarily with respect to publicity, to be asked on an individual basis. The court asked most of the first 27 questions[8] but not in the form proposed by appellant.

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7. The court acceded to a defense request to ask a replacement juror about her husband's employer. And, following the seating of the initial 12 jurors, but prior to the peremptory challenges, he asked if any party had additional questions to be put to the array. The government had none; Taylor requested that they be asked if they had a prior acquaintance with any of the others. The judge asked the question of the 12 and of all those called as replacements for jurors who were peremptorily challenged. Hall requested that the court ask how many received newspapers published by the Oklahoma Publishing Company and of those, how many received the Oklahoma Journal. The court declined on the ground that the subject was covered by the questions concerning exposure to news accounts and the formation of opinions. He did ask, however, whether they could put aside any information acquired from news accounts.

8. The court did not ask question 13a ("Has any prospective juror ever been a prosecution witness in a criminal case?") or question 23 ("Has any juror or any member of your family ever held or sought public office?").

The court did question the jurors regarding their exposure to publicity; its questions were neither so numerous nor detailed as those proposed by Hall. The trial judge, however, "... was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner." Ham v. South Carolina, 409 U.S. 524, 527 (1973); United States v. Hill, 526 F.2d 1019 (10th Cir. 1975); United States v. Crawford, 444 F.2d 1404 (10th Cir. 1971). The court is required to ask questions that are adequate to test the jurors' qualifications; it need not ask questions that are cumulative. Brundage v. United States, 365 F.2d 616 (10th Cir. 1965). Here, while the court's questions were not so numerous as the appellant's submissions and were not as detailed, they contained the substance of Hall's proposed inquiries. In view of this, the court's action was not an abuse of its discretion.

In sum, the questions propounded by Judge Daugherty were sufficient to test their impartiality. All of the jurors who remained on the panel stated that although they had heard of the case, they did not have an opinion either way; those who had pre-formed opinions were excused by the court.[9]

Appellant's further argument is that the court's refusal to question the jurors individually was reversible error. He relies on Silverthorne v. United States, 400 F.2d 627 (9th Cir.

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9. That three or four of those called as prospective jurors admitted prior opinions indicates that there was no atmosphere here which would have inhibited the admission of bias or led to a "bandwagon effect" once one juror had admitted to an opinion. Cf. Irvin v. Dowd, 366 U.S. 717 (1961).

1968), appeal after remand, 430 F.2d 675 (1970), cert. denied, 400 U.S. 1022 (1971). In Silverthorne, the defendant's conviction was reversed and remanded on account of the trial court's failure to inquire specifically into the jurors' impartiality. But, in that case, involving criminal charges against the president of a failed San Francisco bank, there was massive, inflammatory pre-trial publicity.[10] In contrast, the news reporting in the instant case was neither virulent nor massive.[11] Moreover, in Silverthorne, the prospective jurors had heard of the case; also, 30 percent had formed prior opinions. Here, only three or four of the prospective jurors out of approximately 31 who were questioned had preformed opinions. Thus, this case differs from situations like Silverthorne where massive, inflammatory publicity has created a hostile climate requiring extremely close scrutiny of the jurors. E.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Irvin v. Dowd, 366 U.S. 717 (1961); United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir. en banc), cert. denied, 372 U.S. 978 (1963).[12]

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10. Over 300 articles appeared in San Francisco newspapers. There was also extensive television and radio coverage. The news accounts included information about Silverthorne's personal life, speculation about the reasons for the bank's failure, and a story that indicated that the Comptroller of the Currency thought the defendant was guilty.

11. Between January 14, 1975 and January 28, 1975 (about a month prior to Hall's trial), approximately 17 articles which mentioned Hall and the instant case, appeared in four Oklahoma newspapers. The articles were essentially factual reporting, without opinion as to Hall's guilt. Those articles which reported investigations into other offenses mention the instant case as a matter of information, without undue emphasis. Since Hall had been under investigation for some time, newspaper articles reporting these investigations had appeared during 1974, but they were not inflammatory.

12. We do not say that it might not have been better practice in view of publicity involving a public figure to conduct individual voir dire of the prospective jurors. See ABA Standards Relating to Fair Trial and Free Press, Approved Draft, March 1968, Section 3.4; see also, United States v. Colabella, 448 F.2d 1299 (2d Cir. 1971), cert. denied, 405 U.S. 929 (1972). However, this does not suggest that it was error to fail to do so.

We conclude that although all of the jurors had heard about the case,[13] the judge's questions, his excusing of those with opinions, and their statements of impartiality were sufficient to assure Hall's being tried by an impartial jury. See United States v. Liddy, 509 F.2d 4[illegible] (D.C. Cir. 1974)(general questions addressed to the entire array with individual questions put to those with opinions not an abuse of discretion in the trial of a defendant in the Watergate burglary case).

Hall also mentions the denial of his motion for continuance or transfer. Fed.R.Crim.Proc. 21 provides that a criminal case shall be transferred to another district "if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." This determination is left to the discretion of the trial judge. United States v. Jobe, 487 F.2d 268 (10th Cir. 1973); United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973). The publicity here was not such as to call for a transfer, and the court, therefore, did not abuse its discretion in denying Hall's motion.

Finally, Hall mentions the denial of his motion for sequestration during trial. Whether or not the jury is to be sequestered is

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13. "It is not required that the jurors be totally ignorant of the facts and issues involved. * * * To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 722-723 (1961).

left to the sound discretion of the trial judge, given the circumstances at the time and place of the trial. United States v. Hill, 446 F.2d 201 (5th Cir. 1974); Blackmon v. United States, 474 F.2d 1125 (6th Cir. 1973), cert. denied, 414 U.S. 912 (1973). Appellant argues that contacts by a television news reporter with jurors during the trial indicates that the denial of the motion was reversible error. The reporter, however, informed the court immediately after the contact had been made, and a hearing was held at which it was determined that he spoke with two jurors and one juror's mother to ascertain their ages and that nothing was said about the case. While this incident should not have occurred, the prompt hearing assured the court that the jury had not been compromised. There is nothing else in the record to indicate that the jurors had been exposed to outside influences during the trial.[14] We find no abuse.

IV.

MISCELLANEOUS ISSUES RAISED BY HALL: A. CHALLENGE TO THE ADMISSIBILITY OF TAPE RECORDINGS OBTAINED BY ROGERS. B. ALLEGED PROSECUTORIAL MISCONDUCT

A. John Rogers testified that following the approach to him by Hall he went first to the Attorney General and later to the FBI. Transmitter and recording equipment was attached to his person and telephones by the FBI. As a result, the conversations of Rogers with Hall and other principals in the conspiracy were recorded and were later received in evidence.

The defendants argue that it was error for the trial court to receive these in evidence. This argument is based on the provisions

14. While we find no prejudice here, we nevertheless would suggest that it would be better practice to have sequestered the jury.

of an Oklahoma statute, 21 O.S.A. Section 1782 which makes unlawful the recording of a telephone conversation with another without that person's permission. It also prohibits the introduction into evidence of the recorded conversations. This statute is in conflict with the federal law governing the interception of wire and oral conversations, 18 U.S.C. Section 2510 et seq., Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Section 2511(2)(18 U.S.C.) provides that:

> (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Clearly Rogers was acting under color of law and hence he is within the provisions of the quoted provision. Also, it is not disputed that Rogers consented to the recordings. Moreover, the constitutionality of the mentioned provision cannot be disputed. See Lopez v. United States, 373 U.S. 427 (1963); United States v. White, 401 U.S. 745 (1971). Federal law as to validity and admissibility governs. In general, the admissibility of evidence in federal criminal cases is governed by federal law. See United States v. Armocida, 515 F.2d 49 (3rd Cir. 1975); Ansley v. Stynchcombe, 480 F.2d 437 (5th Cir. 1973); United States v. Teller, 412 F.2d 374 (7th Cir. 1969).

Hall claims that the government orchestrated interstate calls in order to induce him to engage in illegal activity within the Travel Act. He relies on United States v. Archer, 486 F.2d 670 (2d Cir. 1973). However, the Archer case is not helpful to Hall. It is concerned with virtual entrapment. In the instant case Hall initiated the transaction with Rogers who went to the Attorney General and FBI. In Archer the authorities took the initiative. This makes a substantial difference.

B. The prosecutorial "misconduct" which is relied on is not misconduct considered in individual instances or in its total effect. Examination of the instances relied on does not reveal conduct which would warrant a reversal. Aiuppa v. United States, 393 F.2d 597, 601 (10th Cir. 1968)(Murrah, C.J.), cert. denied, 404 U.S. 871 (1971). See United States v. Coppola, 479 F.2d 1153, 1162-63 (10th Cir. 1973).

V.

THE SPECIFIC TAYLOR ASSIGNMENTS

A. Whether the trial court erred in not allowing sufficient use of the letter of non-prosecution addressed to Rogers.

B. Whether the trial judge adequately instructed on Taylor's theory of the case.

A.

The so-called Rogers letter was given to Taylor by the United States Attorney. In it the government agreed not to prosecute Rogers for acts or omissions incident to use of political campaign funds. Rogers' problem in the use of campaign funds was unrelated to the transaction that was being tried. The letter was offered by the defense as bearing on the issue of Rogers' consent to the recording of conversations with the defendants. The defense sought to introduce this letter for the additional purpose of affecting Rogers' credibility. In receiving it the court said at first that it was to be considered only as going to the question of Rogers' consent to recording conversations and as to whether Rogers was coerced by the campaign fund inquiry to make the recordings. The court did not instruct the jury, at least to the satisfaction of appellant Taylor, as to the letter's bearing on the credibility of Rogers.

However, the court did instruct the jury quite extensively on the subject of the credibility of Rogers as a witness and in our opinion this was sufficient. The jury was told that if they found that the recordings made by Rogers were voluntarily given that the jury could consider their contents as evidence in the case. The court went on to instruct the jury:

> Likewise evidence has been presented herein regarding a Department of Justice inquiry into the knowledge of the witness John Rogers about a "Special Campaign Fund" in the Office of the Oklahoma State Examiner and Inspector.
>
> The jury may consider this evidence as the same may or may not in the judgment of the jury have affected the voluntariness of the consent of the witness John Rogers to the interception of oral and telephone communications to which he was a party and which conversations were recorded on tape.
>
> The jury may also consider this Department of Justice inquiry as it may or may not in the judgment of the jury have brought about any bias or prejudice on the part of the witness John Rogers for or against any party to this litigation.

Having instructed the jury fully about the problem of Rogers' credibility as it might have been affected by the relationship with the federal government, we are unable to see that the failure to specifically mention the letter could be significant. Taylor's possible bias, prejudice and coercion were brought to the jury's attention.

We disagree with the argument that Taylor was unduly limited in the treatment of this letter. Taylor's counsel was allowed to cross-examine Rogers at length and in a manner which would test his credibility as a witness by reason of his cooperation with the federal government as it might have been affected by his being the subject of an inquiry.

The court was not restrictive in its charge to the jury as Taylor would have us believe. Rogers was not only cross-examined extensively but the issue was finally argued without visible restriction.

In reviewing a question such as this, it is not a matter of whether the defendant was given an instruction in the exact form requested.[15] Rather, the concern is whether his rights were recognized in the court's rulings and in the court's instructions. Considering the transaction in its entirety, and the fact that the trial court modified its original ruling limiting the use of the letter, we are of the opinion that appellant Taylor was not prejudiced.

There is a failure to show that the disputed issues were withheld from the jury. The court's general instructions with respect to Rogers' collateral problems and the court's general instructions on self-interest and impeachment as being proper subjects for jury consideration brought to the attention of the jury the issue of Rogers' credibility. The failure of the court to single out the letter in connection with its charge on credibility of witnesses does not in our judgment constitute error.

B.

Appellant Taylor's argument with respect to the failure of the court to submit his theory of the case pertains to his contention that he acted in good faith and in compliance with Oklahoma law and, therefore, the requisite specific intent

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15. See United States v. Waters, 461 F.2d 249, 251 & 251n.6 (10th Cir.), cert. denied, sub nom. Robins v. United States, 409 U.S. 880 (1972).

required under 18 U.S.C. Section 1952, the Travel Act, was lacking. Appellant's requested instructions read as follows:

"VII.

> It is necessary for the Government (Plaintiff) to prove that the Defendant knew that his act or acts were in violation of the law of State of Oklahoma as such law has been defined to you. Evidence that an accused acted or failed to act because of ignorance of such law is to be considered by the jury, in determining whether or not the accused acted intending with bad purpose to obey or to disregard the law of Oklahoma (Section 13.04, Devitt & Blackmar, as modified for this case; United States v. Stagman (6th Cir., 1971), 446 F.2d 489, 491)."

"IX.

> GOOD FAITH COMPLIANCE WITH STATE LAW.
> You are instructed that while generally ignorance of the law is no defense, where there is evidence of an attempt at good faith compliance with state law such as the law of Oklahoma pertaining to bribery, based upon representations by a principal public official of the State of Oklahoma such may be considered by the jury as to such defendant receiving such representations in determining whether or not the accused acted with specific intent to disobey or to disregard the state law. (United States v. Stagman (6th Cir., 1971), 446 F.2d 489)."

"XX.

> It is no defense that the offer or promise of money or thing of value was made to the public official with the intent to corruptly influence an official act which is lawful, or even desirable or beneficial to the public welfare, although you may consider the lawfulness, desirability, or benefit to the public welfare, as any other circumstances in the case as it may bear upon the specific intent of a Defendant or his purpose of traveling in or using interstate commerce facilities."

In urging good faith belief in the state law as a defense, Taylor relies on United States v. Stagman, 446 F.2d 489 (6th Cir. 1971), wherein the defendant, the operator of a bingo game, had been informed by the Sheriff, Deputy Sheriff and an Assistant Commonwealth Attorney of the county where the game was operated that such games were legal if certain rules were followed. The Sixth Circuit there held that he was entitled to a charge which stated that a finding of specific intent was essential to a verdict of guilty under the Travel Act. It is relevant to consider that during the period of negotiations between Hall, Taylor and Rogers, Taylor received a warning from a co-conspirator that the payments were illegal. Taylor maintains that he inferred from the warning that offers to pay as opposed to making payments were not in violation of the law, but no direct statement to this effect was testified to, so even if we were to follow the decision in Stagman it would not call for a good faith instruction in the present case. The trial court's instructions were adequate.

The answer to all of this is that the jury was charged that the government was required to prove specific intent as an element and that this meant more than general intent; further, it was told that the government must prove that the accused knowingly acted with intent to promote or to carry on or facilitate the promotion and carrying on of the activity of bribery of John Rogers, an Oklahoma public officer, an activity which the accused knew to be unlawful under Oklahoma law, such intent being determined from all of the facts in the case. A further instruction told the jury that an act of bribery is not excused by evidence tending to show that the objectives sought by the bribe may have been desirable or beneficial to the public welfare and that the purpose of the state law making it a crime to bribe a public official is protection of the integrity of acts of public officials

against the temptation of an offer or promise of anything of value to influence their official acts.

We recognize that defendant's theory of the case should be presented so long as it states the law accurately and does not appear confusing to the jury. Cf. United States v. Von Roeder, 435 F.2d 1004 (10th Cir. 1971); Beck v. United States, 305 F.2d 595 (10th Cir. 1962). Also, even when charging the jury as to the defendant's theory of the case, the exact language offered by the defendant need not be followed. See Elbel v. United States, 364 F.2d 127 (10th Cir. 1966).

The instructions here were sufficient and comprehensive. They correctly stated the law with respect to both belief and specific intent.

* * * * * *

The judgments of the district court are affirmed.

MAY TERM - June 8, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DAVID HALL, Defendant-Appellant.	)	No. 75-1358
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. W. W. TAYLOR, Defendant-Appellant.	)	No. 75-1359

This matter comes on for consideration of the petitions for rehearing with suggestions for rehearing en banc filed by appellants in the captioned causes.

Upon consideration whereof, the petitions for rehearing are denied by Senior Judge Breitenstein and Circuit Judges McWilliams and Doyle to whom the case was argued and submitted.

The petitions for rehearing having been denied by the original panel to whom the cases were argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petitions for rehearing are denied.

Holloway, Circuit Judge, did not participate.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

A true copy

Test:

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By /s/ Linda O. Hatle
Deputy Clerk

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Supreme Court, U. S.
FILED
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Nos. 76-1 and 76-11

In the Supreme Court of the United States

OCTOBER TERM, 1976

W. W. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1

W. W. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-11

DAVID HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the district court properly withdrew from the jury's consideration an unnecessary portion of one charge in the indictment.

2. Whether, under the Hobbs Act, 18 U.S.C. 1951, a public officeholder acts "under color of official right" when he induces the payment of money to him in return for the corrupt use of his public office to influence the official action of a public agency of which he is not a member.

3. Whether the courts below correctly found that a juror who temporarily became ill after the jury had retired for deliberations was neither physically nor mentally incapacitated.

4. Whether the district judge properly communicated with the ill juror's physician in order to determine her medical condition.

5. Whether the district court's *voir dire* of prospective jurors was adequate to test their impartiality in light of pretrial publicity concerning the case.

6. Whether the district court should *sua sponte* have excluded testimony by a co-defendant concerning his plea of guilty to one charge of the indictment and whether the court adequately instructed the jury that a co-defendant's plea of guilty is not evidence of another defendant's guilt.

7. Whether the district court adequately instructed the jury concerning petitioner Taylor's theory of his defense.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner Hall (No. 76-11) was convicted of attempted extortion in violation of the Hobbs Act, 18 U.S.C. 1951 (Count I); conspiracy to violate the Travel Act, 18 U.S.C. 1952, by traveling in interstate commerce with intent to facilitate the unlawful bribery of a public official (Count II); and two counts charging substantive violations of the Travel Act (Counts III and IV). Petitioner Taylor (No. 76-1) was also convicted of the conspiracy charge (Count II) and two substantive violations of the Travel Act (Counts V and VI).[1]

[1] R. Kevin Mooney was indicted as a co-defendant in Count II of the indictment. Prior to trial he pleaded guilty to that charge and subsequently testified as a witness for the government.

Petitioner Hall was sentenced to concurrent terms of three years' imprisonment on each count. Petitioner Taylor was sentenced to concurrent terms of eighteen months' imprisonment on each count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

The evidence showed that petitioner Hall (who was at all pertinent times the Governor of Oklahoma) extorted approximately $50,000 from petitioner Taylor and his associate, R. Kevin Mooney, in return for Hall's efforts to influence the official approval of an investment plan that Taylor sought to sell to the Oklahoma Public Employees Retirement System. After Taylor had agreed to pay Hall what he demanded, both Hall and Taylor conspired to bribe certain Oklahoma public officials to ensure the success of the plan. See Pet. App. 2a-6a.

ARGUMENT

1. Count II of the indictment charged petitioners with conspiracy to violate the Travel Act, 18 U.S.C. 1952,[2] by traveling in interstate commerce with intent to promote a scheme to bribe public officials in violation of Oklahoma law, specifically 21 Okla. Stat. 381 and 382.[3] Counts III and IV charged petitioner Hall, and Counts V and VI charged petitioner Taylor, with substantive violations of the Act, similarly alleging that both Oklahoma statutes had been violated.

After a jury had been empanelled, but before evidence had been taken, the district court ruled that the indictment's references to 21 Okla. Stat. 382 (accepting a bribe)

[2] 18 U.S.C. 1952 makes it a crime to travel in interstate commerce with intent to promote or carry on certain unlawful activities, including bribery in violation of state law.

[3] 21 Okla. Stat. 381 prohibits bribing a public officer, and 21 Okla. Stat. 382 prohibits the acceptance of such a bribe.

were surplusage and that the allegations concerning 21 Okla. Stat. 381 (giving a bribe) were sufficient to charge a violation of the Travel Act. The court therefore did not read that portion of the charge to the jury, nor did it instruct them on it.

Petitioners contend (Hall Pet. 15-24; Taylor Pet. 6-8) that the court's action constituted an impermissible amendment of the indictment. The contention is fully answered in the opinion of the court of appeals, which correctly held that neither petitioner was prejudiced by the court's reduction of the charges against them (Pet. App. 8a-11a).

By charging a violation of the Travel Act founded on violations of two Oklahoma statutes, the grand jury necessarily found that probable cause existed to warrant recitation of both of the statutes in the indictment. By deleting reference to one of those statutes, the trial court did no more than withdraw a charge from the jury's consideration, and it is not material whether it did so as a deletion of surplusage or because it did not believe that the charge would be sustained by the evidence. The indictment was in no way enlarged by the court's decision, and it is undisputed that the remaining language charged petitioners with a violation of the Travel Act. They were fully apprised of the charges against them and suffered no prejudice on account of the court's withdrawal of an unnecessary charge from the jury's consideration.

2. Petitioner Hall contends (Pet. 7-15) that he cannot properly be convicted of extortion "under color of official right" because he was neither a member of the Board of Trustees of the Oklahoma Public Employees Retirement System nor entitled, as Governor, to participate in the Board's investment decisions. But, as the court of appeals correctly held, the statute is aimed at "the wrongful use of official power" (Pet. App. 12a) regardless of whether

the power exercised is *de jure* or *de facto*. "So long as the motivation for the payment focuses on the recipient's office"—that is, so long as the acts to be performed "can only be undertaken because of his official position"—then "the conduct falls within the ambit of 18 U.S.C. §1951" even if the acts are "unrelated to his [official] duties * * *." *United States* v. *Braasch*, 505 F. 2d 139, 151 (C.A. 7) (Mr. Justice Clark), certiorari denied, 421 U.S. 910. The facts here plainly satisfy that standard (see Pet. App. 13a).

As Hall himself recognizes (Pet. 12-14), the other courts of appeals that have considered the question are in accord with *Braasch*.[4] To exclude from the statute's prohibition the "obtaining [of] money by a public officer for a service not within the scope of his official duties" (Pet. 9) would unjustifiably eviscerate the Act and create a loophole not intended by Congress. The courts of appeals have properly rejected such efforts to weaken the Hobbs Act, and review by this Court is not warranted.

3. Petitioner Hall argues (Pet. 24-40) that the district court should have ordered a mistrial when one juror became ill during deliberations. He contends that the juror's ingestion of drugs prescribed by her physician influenced her consideration of the case and deprived petitioner of his right to an impartial jury.

Whether the juror's illness or her ingestion of prescription drugs affected her capacity to render an impartial verdict is a matter that was fully explored by

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[4]See, *e.g.*, *United States* v. *Trotta*, 525 F. 2d 1096, 1100 (C.A. 2), certiorari denied, No. 75-1032, May 19, 1976; *United States* v. *Mazzei*, 521 F. 2d 639, 643 (C.A. 3, *en banc*), certiorari denied, 423 U.S. 1014; *United States* v. *Price*, 507 F. 2d 1349 (C.A. 4); *United States* v. *Staszcuk*, 517 F. 2d 53 (C.A. 7, *en banc*), adopting by reference on this point the panel's opinion (502 F. 2d 875), certiorari denied, 423 U.S. 837.

both courts below (Pet. App. 15a-20a, 53a-63a). The district court found, both at the time of the event and on petitioner's subsequent motion for a new trial, that "the juror was capable of rendering satisfactory jury service" (Pet. App. 57a). The court of appeals correctly sustained that finding, specifically rejecting petitioner's contentions that the juror was physically and mentally incapable of rendering an impartial verdict (Pet. App. 18a-19a). There is no reason for this Court further to review this factual issue.

4. In a related contention, petitioner Hall argues (Pet. 40-42) that the district judge acted improperly when he communicated with the ill juror's physician to determine her condition. The impropriety, according to petitioner, is that the communication took place out of his presence and amounted to coercion of the physician to allow the juror to return to jury service. The court of appeals correctly answered both points (Pet. App. 21a):

> The trial judge was faced with a difficult situation which made it necessary that he communicate with the doctor and through the doctor with the juror in order to ascertain her condition. The judge was the person best qualified to carry out the inquiry. We see no impropriety in the judge's communicating with the juror through the doctor. What was said does not add up to pressure. * * * [T]he trial court was careful and conscientious in dealing with a most difficult problem.

Moreover, since the district court, within hours of the communication with the physician, held a hearing at which petitioner was allowed fully to develop the circumstances surrounding the communication, any error related to the communication itself could not have

affected petitioner's substantial rights. See *United States* v. *Arriagada*, 451 F. 2d 487 (C.A. 4); *Ware* v. *United States*, 376 F. 2d 717 (C.A. 7); *Walker* v. *United States*, 322 F. 2d 434 (C.A. D.C.), certiorari denied, 375 U.S. 976.

5. Petitioner Hall next contends (Pet. 42-49) that the district court's *voir dire* of prospective jurors was inadequate to ensure that pretrial publicity did not infect the jury's consideration of the case, because the court declined to question the prospective jurors separately and refused to ask all the questions proposed by petitioner.

The district court asked 19 or 20 questions of the jury array, including (as summarized by the court of appeals) "whether anyone had read or heard any news accounts of the case; whether anyone had discussed it with persons outside the family; if there had been any discussion within the immediate family and was the juror the object of persuasion by family members; if anyone had formed an opinion; if anyone knew of any reason why she or he could not be fair and impartial; if they could put aside anything they had read, been told, or heard about the case" (Pet. App. 23a). The district court determined that, although all but one of the original 12 jurors had been exposed to news accounts of the case, none had discussed it with persons outside the family and none had been the object of persuasion (*ibid.*). Two jurors who stated that they had formed an opinion were dismissed (*ibid.*).

Conduct of the *voir dire* is committed to the sound discretion of the district court. *E.g.*, *Ristaino* v. *Ross*, 424 U.S. 589, 594-595; Fed. R. Crim. P. 24(a). The court of appeals here correctly concluded that the district court did not abuse its discretion. "[W]hile the [district] court's questions were not so numerous as [Hall's]

submissions and were not as detailed, they contained the substance of Hall's proposed inquiries * * * [and] were sufficient to test [the jurors'] impartiality" (Pet. App. 24a). The district court "was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner" (*Ham* v. *South Carolina,* 409 U.S. 524, 527).

Nor was the court required, in the circumstances of this case, to question the jurors individually. Unlike the situation in *Silverthorne* v. *United States,* 400 F. 2d 627 (C.A. 9), appeal after remand, 430 F. 2d 675 (C.A. 9), certiorari denied, 400 U.S. 1022, on which Hall relies, there was here no "massive, inflammatory publicity [that] created a hostile climate requiring extremely close scrutiny of the jurors" (Pet. App. 26a). The court of appeals properly found on this record that, "although all of the jurors had heard about the case, the judge's questions, his excusing of those with opinions, and their statements of impartiality were sufficient to assure Hall's being tried by an impartial jury" (*ibid.*). Petitioner's disagreement with the court of appeals' factual assessment presents no issue warranting review by this Court.

6. Petitioner Hall also contends (Pet. 49-54) that he was denied a fair trial because the prosecutor questioned R Kevin Mooney about his plea of guilty to Count II of the indictment, questioned Hall about Mooney's plea, and referred to the plea during summation. Since Hall did not object at trial to any of these references to Mooney's guilty plea, his contention must be considered in light of the plain error standard of Rule 52(b), Fed. R. Crim. P.

During the government's direct examination of R. Kevin Mooney, the prosecutor elicited from him that he had been

charged as a co-defendant with Hall and Taylor in Count II for conspiring to violate the Travel Act and that he had pleaded guilty to that charge in return for the government's agreement to drop other charges against him (Tr. 303-304). Later, during cross-examination of Hall, the prosecutor again referred to Mooney's guilty plea. Hall's theory of defense was that he was the victim of a "conspiracy" to "set him up" involving the FBI, the United States Attorney, the Oklahoma Attorney General, the Internal Revenue Service and others. He stated his belief that Mooney, although not originally one of the members of that "conspiracy," had joined it in return for the government's agreement to accept his guilty plea. Hall stated that he believed that, in furtherance of the conspiracy against him, Mooney had "testified falsely" (Tr. 1675) and had pleaded guilty to the conspiracy charge notwithstanding that he was guilty only of offering a bribe (Tr. 1388-1390, 1675). The prosecutor asked whether Hall believed that Mooney would plead guilty to a felony and suffer disbarment in order to assist in furthering this conspiracy against petitioner (Tr. 1677-1678). Finally, during his summation to the jury, the prosecutor again referred to the conspiracy of which Hall complained and to Hall's assertion that Mooney had pleaded guilty in furtherance of that conspiracy (Tr. 2187-2188).

The district court instructed the jury that a co-defendant's guilty plea should not be considered "evidence of [a defendant's] guilt" and "gives rise to no inference against" a defendant at trial (Tr. 2271).[5]

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[5]Although the transcription omitted several critical words, so that the instruction appears garbled (see Pet. 54), there is no serious question that the district court in fact instructed the jury as indicated in the text.

When, as in this case, a co-defendant is known to the jury and is referred to throughout the trial but does not appear as an accused, it is permissible for the prosecution to introduce testimony that explains that absence, so long as there is a proper cautionary instruction, as there was here, that a co-defendant's plea of guilty does not constitute evidence against the defendants on trial. *E.g.*, *Smith* v. *United States*, 331 F. 2d 265 (C.A. 8), certiorari denied, 379 U.S. 824; *Krueger* v. *United States*, 331 F. 2d 283, 286 (C.A. 8), certiorari denied, 379 U.S. 879; *United States* v. *Soares*, 456 F. 2d 431 (C.A. 10). The prosecutor's questions of petitioner and remarks during summation concerning Mooney's plea properly probed and discredited petitioner's contention that he was a victim of a conspiracy to frame him.

In these circumstances, Hall has not demonstrated that the district court erred, much less that it committed plain error, in its handling of the evidence concerning Mooney's guilty plea.

7. Petitioner Taylor contends (Pet. 5-6) that the district court erred in refusing to give one of his requested instructions concerning his theory of the case. The contention was thoroughly considered and correctly rejected by the court of appeals (Pet. App. 33a-35a), on whose opinion we rely. As the court correctly concluded, "[t]he instructions here were sufficient and comprehensive" and "correctly stated the law with respect to both belief and specific intent," the issues upon which Taylor's defense turned (Pet. App. 35a).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1976.

see

76-11